

Introduction

The Adoption (Amendment) Bill 2016 demonstrates the second move by the legislature in recent times to significantly amend the Adoption Act 2010. Last year, the Children and Family Relationships Act 2015 was signed into law. Part 11 thereof amends the 2010 Act in a material respect in relation to the categories of persons eligible to adopt a child. The Bill aims to implement the Children's Referendum proposals and update the Adoption Act 2010 with practical reforms, amending and extending the law in relation to the adoption of children. Its provisions attempt to overhaul and modernise adoption law and bring Irish legislation in this area in line with Article 42A of our Constitution.

The Thirty-first Amendment of the Constitution (Children) Act 2012 was signed into law on 28 April 2015. It deletes Article 42.5 of the Constitution and inserts Article 42A in its stead. Being particularly relevant in the context of adoption law, the Constitutional Amendment has had a profound influence on the Bill's provisions.

Apart from maintaining the newly broadened categories of persons eligible to adopt, a number of additional reforms have been incorporated into the 2016 Bill. This includes the promotion of the best interests test and the voice of the child in adoption proceedings, providing for step-parent adoption and enabling the voluntary adoption of marital children. The Bill also proposes to amend the circumstances in which a child may be adopted where his or her parents have failed in their duty towards them; it opens the door for re-adoption; and furthermore creates rights for a new category of persons known as "relevant non-guardians". It similarly raises issues meriting consideration in respect of birth father consultation rights, owing primarily to the impact of the 2015 Act.

The best interests of the child and the voice of the child

The Adoption (Amendment) Bill 2016 gives legislative effect to the Thirty-first Amendment of the Constitution (Children) Act 2012 through its prioritisation of the best interests of the child and its promotion of the voice of the child. Article 42A.4, provides as follows:

- 1° Provision shall be made by law that in the resolution of all proceedings -
 - (i) brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or
 - (ii) concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration.

2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.

This provision therefore mandates that in the resolution of certain specified proceedings, including adoption proceedings, the best interests of the child shall be the paramount consideration and legislation must be enacted to ensure same. Furthermore, it requires that in those specified proceedings, the views of any child capable of forming his or her views be ascertained and given due weight. The constitutional amendment is concerned with placing the child at the centre of proceedings addressing his or her welfare and necessitates the introduction of legislation to reflect its content. The 2016 Act does just that. It emphasises the paramountcy of the best interests of the child throughout adoption law and requires that the wishes of a child must be determined and given due weight in the adoption process where he or she is capable of forming his or her own views in accordance with his or her age and maturity.

Report stage amendments

The Children and Family Relationships Act 2015 contains an explanation of what the court must consider in determining what is in the best interests of the child when it is hearing a guardianship, custody or access case. When published, the Adoption (Amendment) Bill contained no definition of what a court or the Adoption Authority is required to consider when determining the best interests of the child in the course of adoption proceedings. Yesterday Minister Zappone brought forward Amendment 2 to deal with this anomaly. It states that the Authority and court shall have regard to all of the factors or circumstances that it regards as relevant to the child concerned and his or her family in determining what is in the child's best interests. A non-exhaustive list of those factors and circumstances is specifically enumerated in the Bill, including the physical, emotional, psychological, educational and social needs of the child having regard to his or her age and stage of development. This accounts somewhat for the potentially vague nature of the best interests principle and enables the Authority and court to focus on various aspects of the child's present and future well-being.

In relation to adoption proceedings, the Adoption (Amendment) Bill 2016 when published was somewhat silent as to the manner in which the views of the child should be ascertained and the mechanisms by which it is hoped to ascertain first, whether the child in question is capable of

forming his or her own views, and second, what those views are. Amendment 6 introduced at Report Stage yesterday will enable regulations to be introduced setting out methods through which the child's voice can be conveyed to the Authority or the court, as the case may be.

Voluntary adoption of marital children

The 2016 Bill seeks to alter the criteria for a child to be eligible for adoption. At present, pursuant to section 23 of the 2010 Act, the child in respect of whom adoption is proposed must reside in the state and be, at the date of the application, not more than 7 years of age. There is also a requirement that the child is an orphan or born of parents not married to each other and that he or she has been in the care of the applicant for the prescribed period (if any). Section 24 of the Act creates an exception in relation to the age requirement, providing that the Authority may make an adoption order in relation to a child over 7 years of age if it is satisfied that in the particular circumstances of the case it is desirable to do so.

In section 12 of the Bill, a number of alterations are made in respect of children who may be eligible for adoption. First of all, the age limit for adoption is significantly increased. It provides that the Authority shall not make an adoption order in respect of a child unless the child is, at the date of the making of the adoption order, less than 18 years of age. This provision facilitates the adoption of older children without having to seek an exception to the general age requirement. As the age of majority in this jurisdiction is 18 and a child is defined under section 3 of the 2010 Act as a person under the age of 18 years, allowing all children under 18 to be treated equally in respect of the adoption process, as opposed to prioritising those under the tender age of 7, is an appropriate amendment to be introduced into Irish adoption law. This is particularly so in light of the United Nations Convention on the Rights of the Child (UNCRC), Article 1 of which defines a child as a person below the age of 18 unless the laws of a particular country set the legal age for adulthood younger. If children are those persons under 18, requiring that a child be no more than 7 at the time of the adoption application promotes an unnecessary differentiation between children based on age. As a consequence of this amendment, the 2016 Bill seeks to repeal section 24 of the 2010 Act in section 2 thereof.

In addition to the above, the Adoption (Amendment) Bill proposes to remove the requirement that the child in respect of whom an adoption is sought be an orphan or born of parents not married to each other. This prerequisite is set out in section 23(1)(c) of the 2010 Act and it prevents children of married parents being eligible for adoption, save in the very exacting and

exceptional circumstances envisaged by section 54 of the 2010 Act where the parents failed in their duty towards the child. Married parents, therefore, under the 2010 Act cannot voluntarily place their child for adoption. Their children can only be adopted on a non-voluntary basis if section 54 applies. It has long been recognised that this prohibition on married parents choosing to place their child for adoption fails to protect marital children and recognise that the marital contract between their parents is not an iron-clad guarantee that the family is a functional one. A number of marital children are in long term foster care with parents who would allow their child to be adopted, but they cannot voluntarily choose adoption for their child precisely because they are married. There is no mechanism by which two parents who are married to each other can simply waive their parental rights should they wish to give effect to an adoption. This can be said to place the child of parents married to each other at a disadvantage compared with children born outside of wedlock. For these children, therefore, there is no “second chance” available to them which adoption can provide to other non-marital children in similar circumstances and as a result, the 2010 Act in its current form fails to adequately protect the rights of these children.

The 2016 Bill seeks to alter this situation and promote the equality of all children, whether within a marital relationship or otherwise. The Constitutional amendment introduced following the Children’s Referendum and signed into law on 28 April 2015 states in Article 42A.3 that;

- 3 Provision shall be made by law for the voluntary placement for adoption and the adoption of any child.

This expressly provides that the State shall make provision in legislation for the voluntary placement for adoption of *any* child. The amendment of section 23 of the 2010 Act by the 2016 Bill therefore addresses the requirement of Article 42A.3, placing non-marital and marital children on an equal footing in relation to adoption. The Bill, in section 12, effectively deletes the requirement that the child must be an orphan or born of parents not married to each other to be eligible for adoption. This marks a departure from the traditional view that the function of adoption is to provide a marital home for non-marital children and recognises that some children born within marriage – for various reasons not necessarily requiring that parents have “failed” in their duties – may also be best served by adoption. Pursuant to the 2016 Bill, therefore, any child may be voluntarily placed for adoption. This development corresponds with Article 2 of the UNCRC, requiring that all children be treated equally regardless of

(amongst other things) the circumstances of their birth. It is a positive move toward putting the child, and not the marital status of his or her parents, first.

Non-voluntary adoption

A crucial development that is contained in the Adoption (Amendment) Bill 2016 is the change in the criteria under which the High Court may, in a case of parental failure, make an order authorising the adoption of a child without parental consent. The Bill is intended to expand to a certain extent the availability of non-voluntary adoption. This, along with the lifting of the prohibition on the adoption of marital children, is likely to increase the number of children in foster care being adopted.

Part 7 of the 2010 Act concerns situations of non-voluntary adoption of children. It empowers the High Court to authorise the Adoption Authority to make orders for the adoption of children whether born inside or outside of marriage in situations where their parents fail in their duty towards them. As the law currently stands, only in very exceptional circumstances may a child be adopted without the consent of their parents and guardians. Effectively, the current threshold is high, requiring comprehensive failure and complete abandonment by the parents in respect of the child if the court is to authorise the non-voluntary adoption of the child.

Section 23 of the 2016 Adoption (Amendment) Bill seeks to change section 54 of the 2010 Act in a number of material respects in light of the Children's Referendum and Article 42A.2, which differs considerably to Article 42.5. Article 42A.2.1 provides as follows;

- 1° In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

Article 42A.2.2 states:

- 2° Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.

The Constitutional amendment thus mandates that the Oireachtas make provision for non-voluntary adoption where parents have failed in their duty towards a child for such period of time as set out in legislation and requires legislative amendment to bring the legal position in line with that set out in the Constitution. Non-voluntary adoption may still only take place in circumstances that are exceptional, but the criteria to be met are less exacting than those set out in the abovementioned existing section 54. Nonetheless, important safeguards apply in that there must be failure on the part of the parents for the adoption to take place and even where such failure has been established, it must be shown that the adoption is in the best interests of the child.

Section 23 of the Bill proposes to introduce a new test for involuntary adoption into section 54 of the 2010 Act in light of the aforementioned Constitutional amendment. The revised criteria under which the High Court may authorise the making of an adoption order without parental consent are contained in subsection (2A) and are as follows:

- (a) for a continuous period of not less than 36 months immediately preceding the time of the making of the application, the parents of the child have failed in their duty towards the child to such extent that the safety or welfare of the child is likely to be prejudicially affected;
- (b) there is no reasonable prospect that the parents will be able to care for the child in a manner that will not prejudicially affect his or her safety or welfare;
- (c) the failure constitutes an abandonment on the part of the parents of all parental rights, whether under the Constitution or otherwise, with respect to the child;
- (d) by reason of the failure, the State, as guardian of the common good, should supply the place of the parents;
- (e) that the child (i) at the time of making the application, is in the custody of and has a home with the applicants, and (ii) for a continuous period of not less than 18 months immediately preceding that time, has been in the custody of and has had a home with the applicants; and
- (f) that the adoption of the child by the applicants is a proportionate means by which to supply the place of the parents.

In deciding whether to grant an order under this amended section, the court will have to regard the rights of all persons concerned and will have to have regard to the views of the child, where the child is capable of forming his or her own views, giving due weight to them, having regard to the child's age and maturity. Finally, this section emphasises that in the resolution of these applications, the best interests of the child shall be the paramount consideration.

This proposed amendment of section 54 of the 2010 Act allows non-voluntary adoption to take place in situations that are less exacting than those set out in the original section 54. Crucially,

there is no requirement for the court to be satisfied that the parent's failure in their duty towards the child is likely to continue without interruption until the child attains the age of 18. This provision and the use of the term "without interruption" underlined the need to prove that the parent's abdication of their duty was complete in character. Instead, under the 2016 Bill, there must be no reasonable prospect that the parents will be able to care for the child. In this way, it caters for situations where children are in long term foster care where the prospect of them returning to live with their parents is unlikely. Such children may be adopted by their foster parents thereby placing them in a more secure legal position with regard to their long term carers. While the revised criteria for an order under section 54 is intended to broaden the eligibility of children for adoption where their parents have failed in the duty towards them, the lengthening of the cohabitation period from 12 to 18 months ensures that the child has had a home with the applicants for a significant period of time. 18 adoption orders were granted to children from foster care thus far in 2016. The adoption of children from long term foster care may serve to offer some children a second chance to enjoy the stability of a caring and loving family in line with Article 20 of the United Nations Convention on the Rights of the Child. The proposed amendment of section 54 by the 2016 Bill strives to provide a greater prospect of stability for some children in long-term care through the process of adoption by their carers.

Step-parent adoption

The Adoption (Amendment) Bill 2016 for the first time in Irish law allows for step-parent adoption. Step-parent adoption refers to a situation where the natural parent's spouse, civil partner or cohabitant, who is not the other parent of the child, is seeking to adopt the child. Adoption in these circumstances is often sought so that the natural parent's partner can establish legal rights in respect of the child within the family unit and to ensure the child's inheritance rights within the family. At present in Irish adoption law, the only way for a step-parent to legally adopt a child is to jointly do so with the child's natural parent. Only the natural parent's spouse, however, can jointly adopt the child with said parent, as joint adoption is currently only open to marital couples. To effect an adoption of this kind the natural parent also has to adopt his or her own child even though he or she already has parental rights and obligations in respect of the child – thereby requiring the child's parent to relinquish all their rights in respect of the child in order to obtain an adoption order. The 2016 Bill ameliorates the existing situation, remedying a significant lacuna in the 2010 Act. It obviates the need for the natural parent to go through the adoption process in respect of their own child. In addition,

it widens the understanding of “step-parent” to allow the civil partner or cohabitant of a natural parent of a child to apply for an adoption order, as well as the natural parent’s spouse.

Expanding the categories of persons eligible for adoption

Section 33 of the Adoption Act 2010 lists the categories of persons who are eligible to adopt a child. One circumstance alone allows for two persons to adopt a child jointly – namely where they are a married couple living together. While a single person could adopt a child irrespective of their sexual orientation, and that single person could be a member of a civil partnership or cohabiting couple, there was no provision to allow civil partners or cohabitants to adopt jointly. If one member of such a couple therefore adopted a child, he alone held the legal rights attendant upon parenthood and adoption, to the exclusion of the other partner. The Children and Family Relationships Act 2015 has altered this outdated position.

Civil partners and cohabitants

Sections 114 and 115 of the 2015 Act amend sections 33 and 34 of the 2010 Act respectively and allow civil partners and cohabiting couples to jointly apply for an adoption order or for the recognition of an adoption order. The same criteria that apply to married couples apply equally to parties to a civil partnership or those in a cohabiting relationship. A cohabitant is construed under the 2015 Act in accordance with section 172(1) of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 and a new definition of “cohabiting couple” is inserted into the Adoption Act 2010; “*Cohabiting couple means two adults who are cohabitants of each other and who have been living together as cohabitants for a continuous period of not less than three years.*” This definition mandates that cohabitants have resided together for at least three years if they are to be eligible to adopt a child, an appropriate requirement given the desire for children to be adopted into stable environments. The new categories of person eligible to adopt are nonetheless subject to the requirement in section 34 of the 2010 Act that the couple are suitable adopters. Eligibility to adopt is only one aspect of the matter and the detailed criteria on suitability, set out in section 34 of the Act, remain in place.

The 2016 Bill repeals the entirety of Part 11 of the 2015 Act and re-states the main amendments contained therein within the context of the broader reform contemplated in the Bill. Sections 16 and 17 of the Bill similarly develop sections 33 and 34 of the 2010 Act to provide for adoption by civil partners and cohabitants. In addition, section 25 of the 2016 Bill amends

section 58 of the 2010 Act. This provision currently states that upon an adoption order being made, or upon the recognition of an intercountry adoption, that child shall be considered as the child of the adopters born to them in lawful wedlock. The Bill alters this to reflect the fact that the adopters may not be married. Upon an adoption order being made, the child concerned “shall be considered, with regard to the rights and duties of parents and children in relation to each other as the child of the adopter or adopters...” The repeal of the 2015 Act in the Bill is therefore not a step backward as may be assumed incorrectly – the 2016 Act pursues and reiterates those important reforms in adoption law recently passed by the Oireachtas.

Re-adoption

The 2016 Adoption (Amendment) Bill seeks to allow re-adoption in a much wider variety of circumstances. It does so to reflect the increasing diversity of families.

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Fathers and relevant non-guardians

The Adoption (Amendment) Bill and its wide ranging provisions impact upon the rights of fathers in the adoption process. At the same time, rights have been created for a new category of persons with a relationship with the child concerned, referred to as “relevant non-guardians”. The implications of the 2016 Bill ought to be considered alongside the provisions of the Children and Family Relationship Act 2015 relating to guardianship which similarly have significant consequences for the adoption process.

In order for an adoption to proceed, the “full, free and informed consent” of all parties whose consent is required under the legislation must be obtained. Section 26 of the Adoption Act 2010 requires that the following persons must give their consent for an adoption to take place:

- the natural mother of the child;
- any guardian of the child;
- any other person having charge of or control of the child immediately before the child is placed for adoption.

The 2016 Bill does not alter the situation in relation to consent for adoption. It does, however, amend the definition of a “guardian” to take account of amendments in the law relating to guardianship introduced by the Children and Family Relationships Act 2015. In section 3 of the 2010 Act, a guardian is defined as a person who –

- (a) is a guardian of the child pursuant to the Guardianship of Infants Act 1964, or
- (b) is appointed to be a guardian of the child by –
 - (i) deed or will, or

- (ii) order of a court in the State,
and has not been removed from office.

Consultation and relevant non-guardians

Where a father is not a guardian of a child and consequently is not required to give his consent to the adoption process, he nonetheless has a right to be consulted in relation to the adoption.

The 2015 Act introduced extensive amendment to the 2010 Act to cater for situations where children conceived through donor-assisted human reproduction are placed for adoption. Under the 2015 Act, a second female parent was given the same legal status as a father in respect of adoption. That Act, which legislates for donor-assisted human reproduction for the first time in Ireland, defines a “second female parent” as a female, other than the mother of the child, who is determined to be a parent of the child under section 5 of the 2015 Act, where that child is a donor-conceived child. The 2015 Act amended the 2010 Act in a number of respects to give second female parents the same consultation rights as fathers. The relevant sections of the 2015 Act which implemented these amendments, however, have not been commenced. Section 2 of the Adoption (Amendment) Bill now provides for their repeal and instead, the 2016 Bill proposes the insertion of a new definition into section 3 of the 2010 Act – that of the “relevant non-guardian”. This new concept is broadly framed to encompass certain interested parties to an adoption who are not guardians.

A relevant non-guardian in relation to a child means:

- (a) a father of a child who is not a guardian of the child under the Guardianship of Infants Act 1964. It is worth noting that the 2016 Bill provides that “father” in relation to a child, includes a man who is, under section 5 of the Children and Family Relationships Act 2015, a parent of the child where that child is a donor-conceived child;
- (b) a parent of the child under section 5 of the 2015 Act who is not a guardian of the child pursuant to the 1964 Act;
- (c) a person who is appointed as a guardian of the child pursuant to section 6C of the Act of 1964, where subsection (9) of the section applies to that appointment but in respect of which the court has not made an order that the person enjoys the rights and responsibilities specified in subsection (11)(f) of that section; or
- (d) a person appointed by the court to be a temporary guardian of the child under section 6E of the Act of 1964.

While an unmarried father clearly comes within paragraph (a) above, the 2016 Bill extends certain rights under the 2010 Act to the other categories of “relevant non-guardians”. Section 6 thereof entitles relevant non-guardians to inform the Authority of their wish to be consulted

under section 16, and section 7 of the Bill extends the right to pre-placement consultation pursuant to section 17 of the 2010 Act to relevant non-guardians. In the same vein, section 30 of the 2010 Act, as amended by section 13 of the 2016 Bill, provides that on receipt of an application for an adoption order, the Adoption Authority is to take such steps as are reasonably practicable to ensure that every relevant non-guardian of the child is consulted in relation to the adoption and section 22 of the Bill gives relevant non-guardians the entitlement to be heard by the Authority on the application for the Adoption Order. These new provisions not only serve to ensure that non-guardian parents are consulted in relation to an adoption, that is the natural father and the parent under DAHR procedures (including second female parents) but in addition, they give recognition to the new types of guardians that may be appointed in respect of a child pursuant to sections 6C and 6E of the 2015 Act. While these guardians have not such an established status that they require a veto over the adoption, their inclusion in the category of relevant non-guardians reflects the reality that they are an interested party in the child's life whose opinion on the proposed adoption ought to be garnered.

Section 31 of the 2010 Act

Further efforts to give effect to Article 42A of the Constitution can be seen elsewhere in the Adoption (Amendment) Bill 2016. A clear example is the proposed amendment to section 31 of the 2010 Act. This provision authorises the court to make certain orders where there is an application for an adoption order and a person whose consent to the making of the adoption order is necessary, and who has agreed to the placing of the child concerned for adoption either fails, neglects or refuses to give his or her consent to the adoption. Where a person has previously consented to the adoption, but later withdraws his or her consent to give custody of the child to the prospective adopters, orders may also sought under section 31. In these circumstances, the High Court may give custody of the child to the applicants for a specified period and may authorise the Authority to dispense with the consent of a person whose consent to the making of the adoption order is necessary, with the adoption to be effected by an adoption order made during that specified period of custody.

Under the existing section 31, the court may only make such an order as set out above where it is satisfied that it is in the best interests of the child to do so. Section 14 of the Adoption (Amendment) Bill 2016 extends this provision, inserting more detail in relation to the circumstances in which such orders may be made by the court.

Specifically directing that the views of the child in such an application must be ascertained, where the child is capable of forming his or her views, ensures that the child is again at the heart of proceedings concerning him or her. Similarly, setting out a list of matters which the court must consider in section 31 applications is a positive step to guide judicial decision-making and addresses the lack of details set forth in section 31 in its original form.

Conclusion

As a whole, the Adoption (Amendment) Bill 2016 represents a comprehensive attempt to overhaul the law in relation to adoption in Ireland. This is particularly demonstrated in the Bill's endowment upon relevant non-guardians of consultation rights in respect of a proposed adoption. Crucially, the 2016 Bill legislates in accordance with Article 42A of the Constitution, bringing the best interests of the child and the voice of the child to the fore in adoption proceedings.

In the Bill's provision for step-parent adoption, the lacuna in the 2010 Act whereby a child's natural parent was required to adopt his or her own child along with his or her partner has been appropriately addressed. Similarly, by reiterating the newly expanded categories of persons eligible to adopt introduced by the 2015 Act, the Bill cures an out-dated approach whereby only married couples could adopt a child jointly.

In conclusion, the Bill goes a long way toward promoting the equal treatment of all children. Removing the ban on the voluntary adoption of marital children and eradicating any differentiation between children based on their age is in accordance with the United Nations Convention on the Rights of the Child and reflects the content of Article 42A. Similarly, the Bill's amendment of section 54 of the 2010 Act regarding the non-voluntary adoption of children is a welcome development. It allows for children to be adopted in the event that their parents fail in their duty toward them in less restrictive circumstances – a move that will hopefully permit children in long-term foster care to be adopted more readily than the extremely exacting circumstances which currently prevail. The inferred availability of re-adoption in the Bill concurrently ensures that those children who have already been adopted retain the ability to be adopted subsequently when the first placement was not successful. Ultimately, I believe that the Adoption (Amendment) Bill 2016 is a piece of legislative development that is to be broadly welcomed as appropriately modernising the law in relation to adoption and promoting security for all children.

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